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No. 03-92

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In The
Supreme Court of the United States

PATRICK M. HAYS,

Petitioner,

vs.

LUVERNE HOFFMAN, et al.,

Respondents,

and

UNITED STATES OF AMERICA,

Intervenor.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Does a qui tam relator's knowledge of (a) allegations he obtained secondhand from a coworker and (b) allegations he obtained from a Medicaid audit he triggered qualify as "direct and independent knowledge" sufficient to survive the jurisdictional bar of 31 U.S.C. §3730(e)(4)?

Is the Eighth Circuit's decision imposing civil penalties in the amount of $80,000 consistent with this Court's decision in *United States v. Bornstein*?

Does the public disclosure of a state Medicaid agency's compliance audit report invoke the jurisdictional bar of 31 U.S.C. §3730(e)(4)(A)?

Should this Court grant certiorari to resolve a conflict among the circuits where the conflict did not affect the Eighth Circuit's decision?

STATEMENT PURSUANT TO RULE 29.6

St. Francis Health Services of Morris Inc. is a privately held corporation exempt from taxation due to its affiliation with the Catholic Diocese of St. Cloud, Minnesota. It is the parent corporation of Villa of St. Francis Nursing Home Inc., Browns Valley Health Center Inc., Franciscan Health Center Inc., Leisure Hills Health Center, Inc., Prairie Community Services Inc., Prairie Community Waivered Services Inc., and Prairie Land Management Services Inc.

St. Louis Riverview Homes Inc. is privately held and does not have a parent corporation.

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STATEMENT OF THE CASE

St. Francis Health Services ("SFHS") is a non-profit organization that provides health care services to the elderly and disabled in central and western Minnesota.

Patrick Hays was employed by SFHS as a nursing home administrator from 1992 until 1996. He was terminated for incompetence in February of 1996 and offered a lateral position in another part of the company. He began work in the new lateral position on February 26, 1996.

During his employment as a nursing home administrator, Hays learned that SFHS purchased $6,000 worth of apples as holiday gifts for employees but recorded the cost on company books as "resident food". Hays believed that SFHS did this to obtain Medicaid reimbursement for an otherwise unallowable expense. Late in Hays' employment, SFHS Director of Finance Tom Conner told Hays of suspicions Conner had that SFHS engaged in other financial wrongdoing.

Hays drafted "whistleblower" letters and mailed them to the state Medicaid agency (the "DHS") on Friday, February 23, 1996. Hays made allegations of Medicaid fraud concerning the apples in these letters. Additionally, Hays related what Conner told him about Conner's suspicions. Hays brought copies of the letters with him when he started work in the new lateral position on February 26, 1996. Hays showed these letters to SFHS' CEO, and the CEO fired Hays.

The DHS began a field audit of SFHS following receipt of Hays' letters. The DHS issued its audit reports in January of 1997 and made several downward adjustments to SFHS' rates. Nearly all of the audit adjustments were unrelated to the specific allegations contained in Hays'

whistleblower letters. A Medicaid auditor testified at trial that the majority of the allegations in Hays' whistleblower letters were false, erroneous, or resulted in no audit adjustments by the DHS. The DHS did disallow expense related to the purchases of apples and made corresponding adjustments to SFHS' rates.

After the DHS released its audit reports, Hays called the DHS and obtained copies of the reports. The Morris, Minnesota Tribune also obtained copies of the audit reports and published an article about the audit findings. Several months later, Hays' filed his Complaint in this matter alleging that SFHS, its subsidiaries and its upper management violated the False Claims Act by submitting false claims for reimbursement to the Medicaid program. Hays also alleged that he was wrongfully terminated in violation of both federal and state law.

Hays' *qui tam* allegations consisted of the DHS audit findings. Hays attached copies of the audit reports to his Complaint and incorporated all of the audit findings into the counts of his Complaint.

At trial, Hays claimed the defendants violated the False Claims Act in twelve different ways, causing a total loss to the U.S. government of $27,459.00. These twelve items were included in the DHS audit reports, but, other than allegations concerning the apples, were not otherwise specifically alleged in Hays' Complaint.

After trial, the jury found that defendants had submitted false claims regarding eleven different items, but the false claims caused no measurable damages to the United States. The district court then determined that defendants submitted a total of 336 false claims and

imposed the statutory minimum $5,000 fine for each false claim resulting in a total penalty of $1,680,000.

Of the 11 types of false claims represented by the jury verdict, the Eighth Circuit determined that *only* the allegations concerning apples originated with Hays. The Eighth Circuit also found most of the other allegations were not volunteered by Hays in his whistleblower letters to DHS, and Hays obtained information concerning the remaining allegations from Tom Conner. *Hays v. Hoffman*, 325 F.3d 982, 990 (8th Cir. 2003).[1]

Defendants appealed the *qui tam* portion of the judgment. The Eighth Circuit determined that Hays was the original source only of the allegations concerning the apples, and the district court lacked subject matter jurisdiction over the remaining allegations. The Eighth Circuit also found that Hays presented no credible evidence concerning the identity and number of claims presented by defendants. The Eighth Circuit conducted its own review of the trial record, determined that there were only 8 false claims concerning the apples, and imposed a $10,000 penalty for each of these claims.

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[1] Hays claims in his Petition that he made allegations in his whistleblower letters concerning 10 of the 11 false claims found by the jury. Petition at 3. Hays is mistaken. Defendants provided the Eighth Circuit with a table identifying each of the 11 false claims items and the source of allegations concerning those items to demonstrate that Hays did not address most of these 11 items in his whistleblower letters. Appellants' Reply Brief, pps. 13-16. The Eighth Circuit agreed with defendants' factual analysis.

ARGUMENT

I. A QUI TAM RELATOR DOES NOT HAVE "DIRECT AND INDEPENDENT KNOWLEDGE" OF ALLEGATIONS HE OBTAINS SECOND HAND AND ALLEGATIONS HE LEARNS FROM AN AUDIT HE TRIGGERS

The False Claims Act allows a private individual to bring a civil action under the qui tam provisions of the Act. Congress established a jurisdictional bar to prevent various types of parasitic actions:

> No court shall have jurisdiction over an action . . . based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. §3730(e)(4)(A). The allegations were publicly disclosed in the state Medicaid agency audit reports as discussed in Argument III and in the Morris Tribune newspaper article. Therefore the question arises whether Hays was an "original source" of the information.

A relator is not an "original source" of publicly disclosed information unless that relator had direct and independent knowledge of the information upon which the allegations are based and that information was voluntarily brought forward to the government prior to filing the suit. 31 U.S.C. §3730(e)(4)(B).

Hays argues he is an original source and meets the "direct and independent knowledge" requirement because

he obtained information from Conner and passed it on to the DHS. Additionally, Hays argues that all employees who serve as whistleblowers against their employers should be deemed to meet the "direct and independent knowledge" requirement regardless of where the employees obtained the information supporting their allegations. Hays Petition, p. 11.

In his Petition, Hays did not address the Eighth Circuit's factual finding that Hays obtained most of his allegations from the DHS audit reports and not from Conner. Hays does not qualify as an "original source" of information he obtained from the DHS audit reports merely because he triggered the Medicaid audits. To hold otherwise would render meaningless the "direct and independent knowledge" requirement set forth in 31 U.S.C. §3730(a)(4)(B). Additionally, permitting *qui tam* suits by individuals who do no more than trigger a federal or state investigation "would undermine the balance intended by Congress in section 3730(e)(4) between encouraging private citizens to expose fraud unknown to the federal government and preventing parasitic suits by would-be relators who disclose no new information". Brief of Intervenor United States, pps. 35-36. Individuals who simply trigger audits cannot be said to have "direct and independent knowledge" of the audit results. *See United States, Plaintiff, Surender Dhawan & Dennis Gowie, appearing Qui Tam on behalf of the United States of America v. New York Medical College*, 252 F.3d 118, 121 (2nd Cir. 2001). The Eighth Circuit correctly found that Hays did not have "direct and independent knowledge" of allegations he learned from the DHS audit reports.

The Eighth Circuit also correctly determined that Hays did not have direct and independent knowledge of

allegations he learned from Conner and passed on to the state Medicaid agency in his whistleblower letters. "Direct and independent knowledge" is "knowledge that is marked by absence of an intervening agency" or "unmediated by anything but [the relator's] own labor." *Minnesota Association of Nurse Anesthetists, United States ex rel v. Allina Health System*, 276 F.3d 1032, 1048-1049 (8th Cir. 2002), citing *United States ex rel Barth v. Ridgedale Elec. Inc.*, 44 F.3d 699, 703 (8th Cir. 1995). A person who obtains secondhand information from another does not possess direct knowledge and therefore is not an original source. *Barth* at 703; *United States ex rel Laird v. Lockheed Martin*, 2003 WL 21452609 pps. 7-8 (5th Cir. (Tex.)).

Accordingly, Hays was the "original source" only of allegations concerning apples. The Eighth Circuit properly determined the district court lacked jurisdiction over the remaining allegations.

II. THE EIGHTH CIRCUIT CORRECTLY APPLIED *UNITED STATES V. BORNSTEIN* WHEN IT IDENTIFIED AND COUNTED THE FALSE CLAIMS

Hays argues the Eighth Circuit misconstrued the Court's holding in *United States v. Bornstein*, 423 U.S. 303 (1976) and inappropriately identified and calculated the "claims" submitted to the government. Hays misreads *Bornstein*. The Eighth Circuit faithfully applied *Bornstein* and, with the absence of any credible proof by Hays of the nature and quantity of claims submitted by SFHS, identified and performed its own calculations of the false claims.

Hays argues that "the rule in *Bornstein* [is] that the number of civil penalties imposed should be based upon

the number of claims made". Hays Petition p. 12. *Bornstein* did not so hold. This Court actually held that a correct application of the language of the False Claims Act requires that the focus in each case be upon the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures. *Bornstein* at 529. Accordingly, this Court in *Bornstein did not* impose a civil penalty for each claim submitted by the prime contractor; it imposed a civil penalty for each culpable act of the subcontractor. *Bornstein* at 530.

Here, the Eighth Circuit found that SFHS purchased approximately $6,000 worth of apples, gave them to employees during the holiday season, and falsely claimed Medicaid reimbursement for the expense. The Eighth Circuit noted that due to the Medicaid reimbursement system then in place for certain health care facilities, this expense was reflected in multiple facility cost reports. The DHS used these cost reports to calculate payment rates which applied to all covered services over the following year. Under this system, a one-time expense for a multi-facility provider like SFHS may be reimbursed over hundreds or many thousands of claims for reimbursement of services provided to individual residents.

Hays sought civil penalties based on the number of claims for reimbursement SFHS submitted each month for every resident in its facilities. Hays argued that given this reimbursement methodology he could have asked for penalties based on more than 100,000 claims instead of 336 claims. Given the statutory penalty range of $5,000-$10,000 per claim, this would have resulted in potential penalties of $500,000,000 - $1,000,000,000 – all for conduct the jury determined resulted in no measureable loss to the government.

The Eighth Circuit found that Hays failed to offer any of the false claims into evidence at trial, and failed to explain the manner or frequency in which SFHS facilities submitted payment requests to the DHS. The Eighth Circuit characterized Hays' attempts to identify and quantify the claims in this case as "unsupportable as a matter of law" and as an "unsubstantiated guess". *Hays* at 993.

The Eighth Circuit, following this Court's direction in *Bornstein*, focused on the specific conduct of SFHS leading to the submission of false claims concerning apples. The Court reviewed the record and determined that gift apples were claimed by eight SFHS facilities and subsequently disallowed by the DHS. The Eighth Circuit appropriately determined that SFHS was liable for 8 false claims, and imposed the maximum statutory penalty on each of $10,000.

The Eighth Circuit appropriately applied *Bornstein* to the facts of this case.

III. THE PUBLIC DISCLOSURE OF A STATE MEDICAID AGENCY'S COMPLIANCE AUDIT REPORT INVOKES THE FALSE CLAIMS ACT'S JURISDICTIONAL BAR

The jurisdictional bar in the False Claims Act provides in part that "no court shall have jurisdiction over an action . . . based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative or Government Accounting Office report, hearing, audit, or investigation, or from the news media . . .". 31 U.S.C. §3730(e)(4)(A). The allegations in Hays' complaint were publicly disclosed in

both the DHS audit reports and in the Morris Tribune newspaper article before Hays filed his Complaint[2]. Hays argues that allegations disclosed in the DHS audit reports do not qualify as "public disclosures" because the DHS is a state agency, and the jurisdictional bar only applies to matters disclosed in *federal* reports, hearings, audits or investigations.

The Eighth Circuit noted that Medicaid is a cooperative federal-state program through which the federal government provides financial assistance to assist States in furnishing health care to the poor. Although state agencies administer Medicaid, they do so under detailed federal statutory and regulatory controls. State Medicaid agencies, including the DHS, must audit records that support cost-based payments to vendors. 42 C.F.R. §447.202. These agencies must also adopt Fraud Detection and Investigation Programs, conduct preliminary investigations whenever they receive a complaint of Medicaid fraud or abuse, and must request full investigations by the state's Medicaid Fraud Control Unit if the agency's preliminary investigation gives it reason to believe an incident of fraud or abuse has occurred. The results of these investigations must be reported to the Department of Health and Human Services ("HHS"), 42 C.F.R. §455.15(a) setting the stage for either federal or state criminal or civil enforcement actions. *See* Minn. Rules §9549.0041 subd. 15c. State Medicaid agencies, including the DHS, clearly act as agents for the federal government in its Medicaid fraud and abuse detection efforts.

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[2] The Eighth Circuit did not address defendants' argument that the Morris Tribune article also constituted a public disclosure.

The Eighth Circuit noted that this subpart of §3730(e)(4)(A) has not been rigidly limited to disclosures by federal agencies in other contexts. In *Minnesota Association of Nurse Anesthetists* the Court described an audit performed by an insurer on behalf of HHS as an "administrative audit" that could trigger the jurisdictional bar. Similarly, in *United States ex rel Schwedt v. Planning Research Corp.*, 39 F.Supp. 2d 28, 31-33 (D.D.C. 1999) the court held that public disclosures in an audit report prepared for the federal government by an outside accounting firm satisfied the jurisdictional bar.

Anti-fraud compliance audits conducted by state agencies should qualify as public disclosures if they are prepared by or at the behest of the relevant federal agency, or by or at the behest of a state agency that administers the federal grant program under significant Federal regulation and involvement.

Hays cites *United States ex rel Dunleavy v. County of Delaware*, 123 F.3d 734, 745 (3rd Cir. 1997) in support of his proposition that only disclosures by *federal* agencies implicate the jurisdictional bar, and his argument that what the Eighth Circuit did here creates a conflict between the two circuits. *Dunleavy* is distinguishable on the facts. The alleged disclosure in that case was a county report submitted to the Department of Housing and Urban Development by the unit of local government accused of violating the FCA. The Third Circuit noted "those reports have been compiled and produced by a party whose principal motivation (assuming the truth of the fraud claim) is the elimination of the paper trail of fraud". 123 F.3d at 745. Additionally, under the federal grant program at issue in *Dunleavy*, grantee compliance audits are conducted by

federal agencies, and not state agencies acting as agents for the federal government. The Eighth Circuit concluded that the Third Circuit ruled "more broadly than necessary" in concluding that a state agency disclosure may never be an "administrative . . . report [or] audit" for purposes of §3730(e)(4)(A).

Finally, if the DHS is merely a state agency, then Hays loses his jurisdictional qualification as an "original source" on a separate ground. Title 31 U.S.C. §3730(e)(4)(A) provides in part that an original source is one who has "voluntarily provided the information to the Government before filing an action". The word "Government" refers to the *federal* government. *United States ex rel Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 334 (6th Cir. 1999). The record is devoid of any evidence that Hays reported his allegations to any government entity other than the DHS before he filed his FCA complaint. If the DHS is not a federal agency for purposes of the public disclosure bar, then it is also not a federal agency for purposes of the voluntary reporting requirement.

IV. THIS COURT SHOULD NOT GRANT CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS WHERE NO CONFLICT EXISTS

Hays urges this Court to resolve a conflict among the circuits and find, as only the Fourth Circuit has, that the phrase "based upon" in the FCA jurisdictional clause means "derived from" and not "substantially similar to". The Eighth Circuit and the majority of circuits have interpreted "based upon" to mean "supported by".

While this may present an interesting exercise in statutory interpretation, it is wholly unnecessary here. The Eighth Circuit properly noted that Hays virtually conceded his complaint was "based upon" the public disclosure in the DHS audit reports because he drew the factual allegations in his Complaint directly from the DHS audit reports, and actually attached the audit reports to his Complaint. *Hays* at 987-988. The Eighth Circuit noted that suits are "based upon" public disclosures of allegations if they are "derived from" (the minority view) or "supported by" (the majority view) the disclosures. The Eighth Circuit apparently found that regardless of which definition is used, Hays' allegations *were* "based upon" the DHS audit reports. Hays' Complaint *was* the DHS audit reports with a case caption attached.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that the petition for writ of certiorari be denied.

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Respectfully submitted,

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